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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LINDA CARROLL,

Plaintiff,

vs.

DUETSCHKE BANK, N.A., BANK OF
AMERICA, N.A., MORTGAGE
ELECTRONIC REGISTRATION
SYSTEM, INC. AND DOES 1
THROUGH 10, INCLUSIVE

Defendants.

) Case No: 3:13-cv-01592-MMA-BGS

)

)

) **PLAINTIFF'S OPPOSITION TO**

) **DEFENDANTS' MOTION TO**

) **DISMISS COMPLAINT;**

) **MEMORANDUM OF POINTS AND**

) **AUTHORITIES**

)

) Date: September 16, 2013

) Time: 2:30p.m.

) Crtm: 3A-SCHWARTZ

) Judge: Hon. Michael A Anello

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) Action Filed: July 9, 2013

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TO THE HONORABLE COURT:

Plaintiff LINDA CARROLL by and through her attorney of record hereby opposes Defendants' Motion to Dismiss Plaintiff's Complaint. This opposition is based on all of the papers on file with the Court, the arguments set forth, and any arguments made by Plaintiff's counsel at the hearing currently scheduled for this matter.

Dated: August 22, 2013

/s/ Joseph La Costa

Joseph La Costa

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MEMORANDUM OF POINTS AND AUTHORITIES

I. CASE INTRODUCTION

Plaintiff's complaint has sufficiently pled both plausible and factual allegations as well as legal claims, to enable her complaint to move forward. This is not the phase in the litigation to weigh the merits of the case. In reviewing the sufficiency of the claims asserted, the issue *is not* whether Plaintiff will ultimately prevail, but whether the Plaintiff is entitled to offer evidence to support the claims asserted. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In addition, and perhaps most dispositive of the Defendant's Motion to Dismiss, is the fact that the Plaintiff's factual and legal assertions, as contained in the present complaint mirror two cases that have already come to the attention of the Southern District of the Federal Court, and the Court in those cases denied similar motions to dismiss.

The case of *Johnson v. HSBC Bank USA, N.A.* 3:11-cv-2091-JM-WVG (2012) is the mirror image of the factual and legal allegations raised by the Plaintiff in the instant action, with the exception of the seventh cause of action. By order dated March 19, 2012 the Honorable U.S. District Judge Jeffrey T. Miller denied a motion to dismiss premised on essentially the same arguments

1 raised by the Defendants herein. (See Plaintiff's Request for Judicial Notice,
2 Exhibit A, attached hereto.)
3

4 In a strikingly similar case to *Johnson*, the court issued an order
5 denying a motion to dismiss in July 24, 2012 – *Naranjo v. SBMC Mortgage, et*
6 *al* 3-11-cv-02229-L-WVG (2012). Therein, the Honorable Judge M. James
7 Lorenz of the United States District Court denied a motion to dismiss with
8 respect to the factual and legal allegations made that were mirrored in the
9 present cause of action (See Plaintiff's Request for Judicial Notice, Exhibit B,
10 attached hereto).
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14 For the most part, subject to space considerations, the Plaintiff's reply
15 below and the authorities cited will also mirror the arguments made by the
16 plaintiffs in *Johnson* and *Naranjo*, and include the relevant arguments and
17 authorities used by the Court to deny the Defendants motions to dismiss. In the
18 same manner in which the Court in *Johnson* and *Naranjo* denied the
19 defendant's Motion to Dismiss, the Plaintiff respectfully requests that this
20 court similarly deny the Defendants present motion to dismiss.
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23

24 The Plaintiff has challenged the Defendant's overall STANDING to
25 collect the note. Whether or not the original note is in the possession of the
26 Defendants is not central to the question of if the Defendants possess standing
27 to collect on the Note and take actions permitted under the relevant Deed of
28

1 Trust. The Plaintiff has devoted no “ink,” or argument, that claims the MERS
2 system is illegal or improper. The Plaintiff has called into question, and denied,
3 that in this case the persons purporting to act on MERS behalf were in fact so
4 authorized. The Defendant has failed to deny these allegations.
5

6
7 Finally, as will be shown below, the Defendant’s attempt to cast the
8 Plaintiff’s complaint as one fitting the mold of claims previously rejected by
9 the California courts is in error. The Plaintiff’s complaint speaks for itself, and
10 clearly, the Plaintiff has articulated her causes of action based upon plausible
11 factual assertions and a well plead complaint.
12

13
14 For these reasons, the Court should deny the Defendant’s motion to
15 dismiss, and grant the Plaintiff the right to proceed with her case, or
16 alternatively, to amend the complaint in the manner set forth below, as well as
17 any other manner necessary to afford the Plaintiff Due Process of Law.
18

19 **II. STATEMENT OF RELEVANT FACTUAL DISTINCTIONS**

20
21 The Statement of Facts set forth by the Defendant improperly asserts as
22 “fact” many items that are subject to a factual dispute and are specifically
23 called into question or denied by the Plaintiff. At this stage of the proceedings,
24 where the factual assertions of the parties are in conflict, the non-moving party,
25 the Plaintiff’s, plausible factual assertions shall be the basis for the Courts
26 determination of the Defendant’s motion to dismiss.
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1 For example, the Defendant repeatedly refers to the Request for Judicial
2 Notice regarding documents prepared, signed, and recorded by or on behalf of
3 the Defendants. The legitimacy of the recorded documents has been plausibly
4 denied by the Plaintiff. Therefore while the documents themselves exist and
5 have been recorded, their legitimacy and authenticity is disputed, based on the
6 Plaintiff's plausible factual assertion that the documents are fraudulently
7 conveyed, and/or not executed by or on behalf of an authorized entity, the
8 Defendant's reliance on the claimed legitimacy of these documents is disputed.
9
10
11

12 **III. STANDARD FOR DISMISSAL UNDER FEDERAL RULE OF**
13 **CIVIL PROCEDURE 12(b)(6)**

14 Motions to dismiss for failure to state a claim under Federal Rules of
15 Civil Procedure, Rule 12(b)(6) are viewed with disfavor, and accordingly,
16 dismissals for failure to state a claim are "rarely granted." *Gilligan v. Jamco*
17 *Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (Citation omitted). The standard
18 for dismissal under Rule 12(b)(6) is a stringent one. "[A] complaint shall not
19 be dismissed for failure to state a claim unless it appears *beyond doubt* that the
20 plaintiff can prove no set of facts in support of her claim which would entitled
21 her to relief." *See Hartford Fire Ins. Co. V. California* 509 U.S. 764, 811
22 (1993) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Cervantes v.*
23 *City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993) (emphasis added). The
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1 purpose of a motion under Federal Rule 12(b)(6) is to test for formal
2 sufficiency of the statement of the claim for relief in the complaint. *See*
3 *Rutman Wine Co. v. E & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987).
4 The complaint must be construed in the light most favorable to the nonmoving
5 party and its allegations taken as true. *See Scheuer v. Rhodes*, 416 U.S. 232,
6 236 (1974). It is *not* a procedure for resolving a contest about the facts of the
7 merits of the case. In reviewing the sufficiency of the complaint, the issue is
8 not whether the plaintiff will ultimately prevail, but whether the Plaintiff is
9 entitled to offer evidence to support the claims asserted. *See Scheuer v.*
10 *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Furthermore,
11 more recently the U.S. Supreme Court has held that to survive a motion to
12 dismiss, a complaint must contain sufficient factual matter, accepted as true,
13 which would “state a claim to relief that is plausible on its face.” *See Bell*
14 *Atlantic Corp. v. Twombly*, 55 US 544 (2007).

21 In addition, and as discussed above, the Courts holding in *Johnson v.*
22 *HSBC Bank USA, N.A.* 3:11-cv-2091-JM-WVG (2012) and *Naranjo c. SBMC*
23 *Mortgage, et al* 3-11-cv-02229-L-WVG (2012) leave no doubt that the
24 complaint, as filed is not subject to a Motion to Dismiss at this stage of the
25 proceedings. The Plaintiff has every expectation that the Court will come to a
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1 similar conclusion regarding the lack of merit of the Defendant's motion, and
2 respectfully requests the Defendants motion be denied.
3

4 **IV. INTRODUCTION**

5 The Defendants attempt to advance the argument that California law
6 permits illegal foreclosure with absolute impunity because the cited statutes
7 provide no method to challenge the purported foreclosure. Quite simply, the
8 Defendant's ask the Court to adopt a rule of law where large banks can and
9 will illegally foreclose the property of another without due process of law or
10 legal oversight or review. Were that to be the law of California it would be in
11 conflict with both the State and Federal Constitutional Due Process standards.
12 The Plaintiff's complaint has set forth plausible factual assertions that create
13 valid well plead causes of action seeking declaratory relief and damages. The
14 complaint should not be dismissed.
15

16 The Plaintiff denies that the Defendants are or were ever her creditors,
17 and by their actions she has suffered pecuniary loss.
18

19 The Plaintiff has set forth plausible factual assertions that the holder of
20 the deed of trust, whomever the Court may determine that may be, is not the
21 actual holder of or agent of the holder of the note. The Defendants have
22 offered nothing to rebut these plausible factual assertions.
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1 **V. The Defendants have ignored the Plaintiff's challenge to the**
2 **purported actions by MERS.**

3 The Defendants have set forth actions they purport to have been
4 undertaken by MERS, and they rely on these purported acts in support of their
5 motion, when in fact all of the actions described were acts undertaken by the
6 Defendants based on their disputed claims to the right to act on MERS behalf.
7 The Plaintiff's complaint has challenged the legitimacy and authenticity of the
8 documents. The documents were purportedly signed by or on behalf of MERS,
9 indicating that the individuals purporting to sign on behalf of MERS did so
10 without the requisite authority. Those documents included the corporate
11 authority required by the MERS Board of Directors, and that the documents
12 tendered and recorded by or on behalf of the Defendant were forged and
13 fraudulent. The Defendant has ignored these factual allegations save to ask the
14 Court to ignore them too.
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23 **VI. The Plaintiff Denies that Foreclosure was proper because**
24 **DEUTSCHE BANK is not and was not her creditor**

25 The Plaintiff's complaint set forth plausible factual denials that
26 DEUTSCHE BANK is, or was, her creditor, and has provided plausible factual
27 allegations in support of the position. Defendants point to the California Civil
28

1 Code and the case law that provides the procedures articulated therein provide
2 the “exhaustive” procedure to accomplish a non-judicial foreclosure. These
3 Defendant’s arguments in this regard are irrelevant at this stage of the
4 proceedings. In effect, the Defendants stated goal is to obtain a “non-judicial”
5 foreclosure of the Plaintiff’s property.
6
7

8 California Civil Code section 2924 provides the identity of the entities
9 who may initiate a foreclosure as “[t]he trustee, mortgagee, or beneficiary, or
10 any of their authorized agents.” The Plaintiff’s complaint provides ample
11 factual assertions that DEUTSCHE BANK does not qualify as an identifiably
12 permitted entity to initiate a foreclosure proceeding.
13
14

15 Accordingly, the Plaintiff disputes that DEUTSCHE BANK is or was
16 empowered with the statutory authority to undertake **ANY** action relative to
17 the note and deed of trust, and as a result, Plaintiff claims pecuniary and other
18 damages.
19
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21 In addition, notwithstanding the above, the Plaintiff, in the Deed of
22 Trust, reserved the right to “bring a court action to assert the non-existence of a
23 default or any other defense of Borrower to acceleration and sale.”
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VII. Plaintiff Has Alleged an Actual Controversy Among the Parties Sufficient to Maintain a Cause of Action for Declaratory Relief

The foundation of Plaintiff's First Cause of Action is a request that the court determine the rights and obligations of the parties relative to the Property. *Section 2201(a) of Title 28 of the United States Code* expressly permits a party to bring a cause of action for Declaratory Relief. It states, "In a case of actual controversy within its jurisdiction... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

As to a controversy to invoke declaratory relief, the question is whether there is a "substantial controversy, between parties having adverse legal rights, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.* 312 U.S. 270 (1941).

The United States Supreme Court further explained:

"A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot...The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests...It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

1 *Aetna Life Ins. Co. of Hartford Conn. v. Haworth*, 300 U.S. 227, 240-241, 57
2 S.Ct. 461, 464 (1937) (citations omitted).
3

4 Here, Plaintiff has alleged an actual case and controversy in connection
5 with Defendants' actions that are present, ongoing and undoubtedly will
6 continue in the immediate future. The Defendant has previously, and continues
7 to assert a right to foreclose, and has initiated process designed to ultimately
8 oust the Plaintiff from her home, thereby asserting a proprietary interest in
9 Plaintiff's Property. *See Seattle Audobon Soc'y v. Moseley* 80 F.3d 1401, 1405
10 (9th Cir. 1996) ("A declaratory judgment offers a means by which rights and
11 obligations may be adjudicated in cases brought by an interested party
12 involving an actual controversy that has not reached a stage at which either
13 party may seek a coercive remedy and in cases where a party who could sue
14 for coercive relief has not yet done so.") Defendant still claims an interest in
15 the Property, continue to seek collection of Plaintiff's mortgage payments, and
16 still seek to strip possession and ownership of Property from Plaintiff.
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22 The Defendants argue the nonexistence of an actual controversy between
23 the parties yet clearly asserts a right to and an intention of taking the Plaintiff's
24 home away from her. Where, as here, the Plaintiffs have alleged Defendants
25 have no standing to do so; clearly these mutually exclusive assertions create a
26 real and justiciable controversy for resolution by this Court.
27
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1 The Ninth Circuit has explained that while there is no bar to declaratory
2 relief if legal remedies exist, a court's discretion should lead it to refuse to
3 grant declaratory relief unless it would clarify the parties' interests or relieve
4 the uncertainty-giving rise to the proceeding. *U.S. v. Washington*, 759 F.2d
5 1353, 1356-57 (9th Cir. 1985). The court upheld a declaratory relief claim in a
6 similar action to this one, noting that there was a controversy over whether the
7 assignment of a deed of trust was fraudulent, and the cause of action was not
8 duplicative. *Schafer v. CitiMortgage* 2011 WL 2437267 (C.D. Cal June 15,
9 2011) at *4.

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17 The Plaintiff acknowledges that given the other causes of action pending
18 that declaratory relief may be unnecessary. However, it would be premature to
19 dismiss the cause of action as this point.
20

21 **VIII. Plaintiff Has Sufficiently Alleged a Cause of Action for Negligence**

22 Defendants owe Plaintiff a duty of care because of their unconventional
23 relationship with Plaintiff. Traditionally, a lender loaned money to a borrower
24 and serviced the loan. Here, Defendants' role is not "conventional" because the
25 Defendant DEUTSCHE BANK is a bank acting as trustee for a trust and not
26 the original lender who loaned or serviced Plaintiff's Loan. The relationship
27
28

1 between Defendants and Plaintiff is not indicative of a “conventional” lender-
2 borrower relationship because DEUTSCHE BANK is not receiving the
3 benefits from Plaintiff’s Note and Mortgage. Instead, Defendants purport to
4 hold Plaintiff’s payments for the benefit of the “certificate holders” who own
5 the relevant note. In addition, a bank may be liable in negligence if it fails to
6 discharge its contractual duties with reasonable care. *Das v. PHH, N.A.* 186
7 Cal. App. 4th 727, at 741 (2010) citing *Chazen v. Centennial Bank* 61 Cal. App.
8 4th 532, 537 (1998). Additionally, “[a] lender may owe a duty of care
9 sounding in negligence to a borrower when the lender’s activities exceed those
10 of a conventional lender...” *Osei v. Countrywide Home Loans*, 692 F.Supp.2d
11 1240, 1249 (2010), noting the Defendant elected to extensively cite *Das* in its
12 MTF, while ignoring the fact the citation came from *Chazen*.
13

14 In this instance, the Defendants loaned no money to the Plaintiff, and the
15 lender-borrower relationship is disputed, and is believed to “not exist” as
16 between the parties. Accordingly, the Defendants cannot hide behind the
17 protection afforded a “lender” when it was not in fact a lender of money to the
18 Plaintiff, and its very status as a creditor is disputed.
19

20 In addition, the rule that a “lender” does not have a duty to a borrower is
21 only a “general rule,” and only applies to situations where a lender plays its
22 conventional role. *Teheny v. Wells Fargo Bank, N.A.* 2010 WL 5394315 (E.D.
23

1 Cal. 2010). Accepting the allegations of the Plaintiff's complaint, DEUTSCHE
2 BANK has gone beyond the typical lender's role. Generally, Plaintiff has
3 alleged that Defendants did not have the legal authority to demand payments
4 from Plaintiff because of the invalidity of the documents purporting to create
5 the relevant assignments. If DEUTSCHE BANK were not a lender legally
6 authorized to collect payments from Plaintiffs the general rule shielding actual
7 lenders from liability would not apply.

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11 **IX. The Purported Assignment To DEUTSCHE BANK, As Trustee Is**
12 **Invalid And Unenforceable as New York Trust Law Requires Strict**
13 **Compliance With the Terms Governing Trust Agreement**

14 Plaintiff's Deed of Trust was executed in favor of Countrywide Home
15 Loans. Since DEUTSCHE BANK was not the originator of the Mortgage, any
16 purported rights over Plaintiff's debt obligation must be pursuant to a valid
17 assignment or transfer of the Note and Deed of Trust to the Defendant as
18 Trustee of the securitization Trust.

19
20
21 The Plaintiff has provided a plausible factual allegation that the lender,
22 Countrywide Home Loans has not, in any manner, caused the Note to be
23 assigned to the Defendants. The Plaintiff has pled more than sufficient facts
24 whereby the court can make a plausible inference that these allegations are
25 true.
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1 Under New York law, for a trust to be valid there are four essential
2 elements: (1) a designated beneficiary; (2) a designated trustee who is not the
3 beneficiary; (3) a fund or other property sufficiently designated or identified to
4 enable title thereto to pass to the trustee; and (4) actual delivery or legal
5 assignment of the property to the trustee, with the intention of passing legal
6 title to the trustee. *Brown v. Spohr*, 180 N.Y. 201-210 (N.Y. 1904)
7

8
9 Plaintiff alleges that with respect to her Loan, there was no actual
10 delivery of, or valid assignment of, the Note to any Defendant by the original
11 lender, the Originator of the relevant Trust, or the Trustee of the Harborview
12 2005 Trust.
13
14

15 Under New York Law, without a valid delivery of the asset in question
16 to the trust, there are no rights conferred in the trustee under the common law.
17 Thus, if the trust fails to acquire property, then there is no trust over that
18 property that may be enforced because "every act in contravention of the Trust
19 is void." *Dye v. Lewis*, 67 Misc. 2d 426, 324 N.Y.S.2d 172, 175 (Sup. Ct.
20 1971) (citing *N.Y. Est. Powers & Trusts Law* § 7-2.4).
21
22

23 Additionally, where the method of transfer is set forth in the Trust
24 instrument, it is not subject to any variance or exception. *N.Y. Est. Powers &*
25 *Trusts Law* § 7-2.4 ("If the trust is expressed in the instrument creating the
26 estate of the trustee, every sale, conveyance or other act of the trustee in
27
28

1 contravention of the trust, except as authorized by this article and by any other
2 provision of law, is void.”)

3
4 Recently, in California, this very issue came before the Fifth Appellate
5 District in the case of *Thomas A Glaski v Bank of America N.A.*, F064556 2013
6 WL 4037310 (Cal App 5th Dist. 2013). Therein, the court found that in
7 instances where the Assignment of the Deed of Trust occurred after the closure
8 of the trust, there was no transfer and the Trustee possessed no authority by
9 which to initiate a Notice of Default or Notice of Trustee’s Sale. See Pg 17
10 Slip Opinion. The Glaski case echoed the earlier similar finding of
11 *Barrionuevo v Chase Bank N.A.* (N.D. Cal 2012) 885 F.Supp 964, 973.
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15 **X. Plaintiff Sufficiently Alleges the Assignments Were Fabricated**

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17 As in *Glaski*, the Plaintiff herein contends that the purported
18 “Assignment,” even if valid – which is disputed by the Plaintiff - was executed
19 and notarized **after** the closing date of the Harborview Trust and is therefore
20 invalid.
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22 The Assignment’s failure to comply with the PSA is a sufficient basis
23 for pleading its fabrication. *See Glaski, supra* and *Vogan v. Wells Fargo et al.*
24 No. 11-cv-2098-JAM-KJN, 2011 WL 5826016 at *7 (N.D. Cal. Nov. 11,
25 2011) (“Plaintiffs alleged that the recorded assignment was executed well after
26 the closing date of the [trust] to which it was allegedly sold, giving rise to a
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1 plausible inference that at least some part of the recorded assignment was
2 fabricated.”).

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4 In *Kingman Holdings, LLC v. CitiMortgage, Inc.* 2011 WL 1883829
5 (E.D. Tex. 2011) where the court accepted allegations such as those set forth in
6 the complaint. In *Kingman*, the court assessed a fraud claim against
7 CitiMortgage in which the plaintiff alleged that MERS’ appointment of an
8 assistant secretary (“Blackstun” who later made the assignment) was invalid
9 because it was not approved by the board of directors. The court upheld the
10 fraud claim under the 9(b) standard, finding that Plaintiff’s allegations were
11 plausible and that if Blackstun had no authority to bind MERS, then MERS
12 filed a fraudulent document after he executed the assignment.
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15 Similarly, in *Vogan*, supra, the court denied defendants’ motion to
16 dismiss a § 17200 claim because, as here, the plaintiff pleaded that Wells
17 Fargo recorded a fabricated assignment of the loan. In that case, again, as in
18 the instant, the assignment was executed **after** the closing date of the mortgage
19 backed security pool, “giving rise to a plausible inference” of fabrication. *Id* at
20 *7. In the case at bar, in addition to attacking the authority of the person
21 purporting to sign, the Plaintiff has alleged that the assignment was made **after**
22 the closing date of the trust, as required by Section 2.1 of the PSA.
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XI. Plaintiff has Standing to Assert that the Defendants are Not Her Creditors

Defendants' contention that Plaintiff lacks standing to challenge or sue under the PSA is a misnomer. First, the Plaintiff has offered plausible factual arguments that none of the Defendants is the actual successor in interest in the subject Note. Further, in the unlikely event that an authorized act attempted an assignment of the Note to the Defendant Trust, Plaintiff does not challenge the validity of securitization in general or sue for breach of contract under the PSA. Rather, Plaintiff brings this suit to protect her own interest in the Property. Defendants' failure to follow the PSA has an observable legal effect. *See N.Y. Est. Powers & Trusts Law § 7-2.4*. As Defendants lack standing under the Deed of Trust to demand payments or foreclose on the Property, Plaintiff sues to establish the parties' respective rights and obligations under such Deed of Trust and to enjoin Defendants from taking action against her home. *See Tamurri v. Suntrust Mortgage, Inc.*, No. C-11-899 EMC, 2011 WL 6294472, at *12, 14 (N.D. Cal. Dec. 15, 2011) (finding prejudice where foreclosing entity initiated foreclosure prior to acquiring beneficial interest in the deed of trust) ("Thus, assuming prejudice is required, the threat of foreclosure by the wrong party would certainly be sufficient to constitute prejudice to the homeowner.").

1 Contrary to Defendants’ assertions regarding standing, “standing” to sue
2 is a jurisdictional limitation. The doctrine of standing is comprised both of
3 constitutional or “Article III” requirements and of “prejudicial considerations.”
4 *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S. Ct 1601,
5 1607 (1979) and toward that end, Plaintiff’s complaint has set forth plausible
6 facts that establish the required 1) injury in fact; 2) causation; and
7 redressibility. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct.
8 2130, 2136 (1992).

9 The “injury in fact” requirement is met upon a showing that plaintiff is
10 threatened with impairment of her own interests. *See Gladstone Realtors v.*
11 *Village of Bellwood*, 441 U.S. at 100. Here, Defendants claim a right to collect
12 payments from Plaintiff and a stake in the Property, which is her home. *See*
13 *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240, 57
14 S.Ct.461 462-464 (1937) (cases involving a substantial controversy between
15 parties having adverse interests of sufficient immediacy and reality are
16 justiciable as a case and controversy under Article III).

17 In addition to “injury in fact,” there must be a causal connection between
18 the injury and the conduct complained of. *See Lujan*, 504 U.S. at 559-560. In
19 the instant case, Defendants seek to assert their purported rights under the
20 Deed of Trust, including the power to collect payments with the threat of
21

1 invoking the non-judicial foreclosure statute and the taking of the Plaintiff's
2 home. The Plaintiff has claimed injury – imminent loss of the Property – that is
3 directly caused by Defendants' conduct. Thus, Plaintiff has sufficiently alleged
4 the required causal connection between injury and Defendants' conduct.
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7 Finally, there must be a substantial likelihood that the relief sought, if
8 granted, will redress the injury. *Lujan*, 504 U.S. at 559-560. Here, Plaintiff
9 seeks an adjudication of the parties' respective rights to the Property and under
10 the Plaintiff's Note and Deed of Trust. To the extent that Defendants are
11 deemed to have no legal rights in connection with Plaintiff's Note and Deed of
12 Trust, Plaintiff also seek to enjoin Defendants from demanding payment,
13 reporting derogatory information to the credit bureaus and foreclosing on her
14 home. Thus, the declaratory and injunctive relief sought here will redress
15 Plaintiff's injury and prevent the imminent loss of her home.
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19 **XII. Plaintiff's Challenge to DEUTSCHE BANK's Authority is Proper**
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21 Courts have recognized a borrower's right to bring claims challenging a
22 party's interest under a deed of trust. *See Vogan*, 2011, WL 5826016, *7;
23 *Schafer v. Citimortgage, Inc.*, No CV 11-03919 ODW, 2011 WL 24372667, *4
24 (C.D. Cal. June 15, 2011); *Sacchi v. Mortgage Electronic Registration*
25 *Systems, Inc.* No. 11-1658 AHM, 2011 WL 2533029, at *5 (C.D. Cal June 24,
26 2011) ("It is true, as Defendants repeatedly assert, that *California Civil Code* §
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1 2924, *et seq.* authorizes non-judicial foreclosures in this state. It is not the case,
2 however, that the availability of a non-judicial foreclosure process somehow
3 exempts lenders, trustees, beneficiaries, and the numerous other (sometimes
4 ephemeral) entities involved in dealing with Plaintiffs from following the
5 law.”) Indeed, one of the very purposes of California’s non-judicial foreclosure
6 statutes is “to protect the debtor/trustor from wrongful loss of the property.”
7 *Fontenot v. Wells Fargo Bank, N.A.* 198 Cal. App. 4th 256, 270 (2011) (internal
8 quotations omitted). Defendants cannot hide behind the non-judicial statutory
9 framework when they do not meet its most basic requirements.¹

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14 Lenders have seized on the recent ruling in *Gomez v. Countrywide*, 192
15 Cal. App. 4th 1149 (2011), by straining the interpretation of its holding to mean
16 that a homeowner cannot challenge a foreclosure or his purported creditor’s
17 right to enforce the deed of trust – under any circumstances. *Gomes* held that
18 California Civil Code § 2924(a)(1) does not “provide for a judicial action to
19 determine whether the person initiating the foreclosure process is indeed
20 authorized.” *Id.* at *1155. But the issue in *Gomes* was not whether the wrong
21 entity had initiated foreclosure; rather the issue was whether the company
22 selling the property in the non-judicial foreclosure sale (MERS) was

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27 ¹ A recent audit commissioned by the San Francisco Office of the Assessor-Recorder
28 reviewed 382 foreclosures from 2009 to 2011 and found that 84% contained at least one
clear violation of California’s foreclosure laws. The audit is available on the Assessor-
Recorder’s website at <http://sfassessor.org>

1 authorized to do so by the owner of the promissory note. *See id.* at 1155
2
3 (rejecting the argument that a plaintiff may test whether the agent initiating the
4 foreclosure has the authority to do so; “[t]he recognition of the right to bring a
5 lawsuit to determine a nominee’s authorization to proceed with foreclosure on
6 behalf of the note holder would fundamentally undermine the non-judicial
7 nature of the process and introduce the possibility of lawsuits filed solely for
8 the purpose of delaying valid foreclosures”). That is, *Gomes* involved a
9 challenge to whether an *agent* had the authorization of its principal, who was
10 the undisputed beneficiary under the deed of trust, to initiate foreclosure. It
11 was not, as here, a challenge to the *principal* status it claims as beneficiary
12 under the deed of trust.
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17 Notably, the *Gomes* court distinguished a case cited by the Plaintiffs
18 precisely because, in that case, “the plaintiff alleged wrongful foreclosure on
19 the ground that assignments of the deed of trust had been improperly
20 backdated, and thus the wrong party had initiated the foreclosure process. No
21 such infirmity is alleged here.” *Id.* Thus, *Gomes* explicitly avoided the scenario
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23 pled here, in which “the plaintiff’s complaint identified a specific factual basis
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for alleging that the foreclosure was not initiated by the correct party.” *Id.* at 1156. *Gomes* is thus therefore inapposite.²

XIII. Plaintiff has Sufficiently Plead a Quasi-Contract Claim

Plaintiff had specifically alleged Defendants were unjustly enriched to Plaintiff’s detriment by accepting and retaining Plaintiff’s payments without acquiring an interest in Plaintiff’s note and Deed of Trust. California Courts agree that if a plaintiff alleges that a defendant was unjustly enriched to his detriment he is allowed to seek restitution under a Quasi Contract claim. “[I]t is clear that California courts consistently permit a party to seek restitution under a variety of theories, including quasi-contract and constructive trust.” See *McKell v. Washington Mut. Inc.*, 142 Cal. App. 4th 1457, 1490 (2006); *Louiseau v. VISA USA Inc.*, WL 4542896 (S.D. Cal. 2010). “Under the law of restitution, “[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another’s expense. [Citation.]” *McBride v. Boughton*, 123 Cal. App. 4th 379, 389 (citing *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662).

² Defendant’s reliance on *Gomes* and California’s non-judicial foreclosure statutory framework is also undermined by the clear language contained in the Deed of Trust providing that the Plaintiff reserved the right to “bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale.” (Comp. Ex C, Section 22.)

1 **XIV. Defendants are “Debt Collectors” Under the Fair Debt Collection**
2 **Practices Act (“FDCPA”)**

3 Defendants argue that it is not a “debt collector” as defined under the
4 FDCPA. The FDCPA defines a debt collector as “any person who uses any
5 instrumentality of interstate commerce or the mails in any business the
6 principal purpose of which is the collection of any debts, or who regularly
7 collects or attempts to collect, directly or indirectly, debts owed or due or
8 asserted to be owed or due another.” 15 U.S.C. § 1692a(6). A mortgage
9 servicer can be a debt collector under the FDCPA if the debt is in default at the
10 time the debt collection is acquired. See U.S.C. 1692A(6)(F)(iii). A Notice of
11 Default was filed on May 28, 2010 alleging that the Plaintiff was in Default of
12 the Note and Deed of Trust. DEUTSCHE BANK purportedly benefited from
13 an “assignment” dated September 1, 2012. Since DEUTSCHE BANK’s
14 interests were purportedly created AFTER a Default was declared, clearly
15 DEUTSCHE BANK’s interests were acquired at a time where DEUTSCHE
16 BANK alleges the Note was in a default status. DEUTSCHE BANK is
17 therefore a debt collector under the FDCPA.³

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³ Defendant’s own correspondence to Plaintiff states that the communication is made from a “debt collector.” (Compl. Ex D, E, F, G, H, I, J) Having asserted and declared themselves to be “debt collectors”, the Defendant should now be estopped from denying the very title they have used to attempt and coerce payments from the Plaintiffs.

1 **XV. Plaintiff Has Sufficiently Alleged a Claim Under California Business**
2 **and Professions Code Section 17200**

3 The Unfair Competition Law (UCL) is codified in California Business
4 and Professions Code Section 17200. The UCL prohibits any unlawful, unfair,
5 or fraudulent business practice. The UCL is written in the disjunctive, which
6 means a business act or practice can be alleged to be all or any of the three
7 prongs. *Berryman c. Merit Property Management, Inc.* 152 Cal.App. 4th 1544,
8 1554 (2007).

9 Here, Plaintiff allege Defendants have engaged in practices that are (1)
10 unfair, (2) likely to deceive and (3) unlawful. Defendant has collected
11 Plaintiff's payments with no right to do so.

12 In addition, it is against public policy and substantially injurious to
13 engage in unfair debt collection practices as Defendants did here. "[T]he
14 Supreme Court has not yet enunciated a legal test for unfairness in consumer
15 actions under the unfair competition law. The courts of appeal have variously
16 suggested that a practice is unfair if it offends an established public policy or is
17 'immoral, unethical, oppressive, unscrupulous or substantially injurious to
18 consumers,' and that unfairness is determined by weighing the utility of the
19 practice against the gravity of the harm to the consumer." *Kunert v. Mission*

1 *Financial Services Corp.* 1 Cal.Rptr.3d 589, 607 (2003). The harm to Plaintiff
2 and consumers in general greatly outweighs Defendant's unfair actions.
3

4 Defendants also engaged in "fraudulent" business practices. To state a
5 claim for fraudulent business practices under section 17200, Plaintiff needs
6 only demonstrate that "members of the public are likely to be deceived." *Bank*
7 *of the West v. Sup. Ct.* 2 Cal.4th 1254, 1267 (1992) citing to *Chern v. Bank of*
8 *America* 15 Cal.3d 866, 876 (1976). U.S. Bank's business pattern, collecting
9 on a debt it has not right to, is extremely likely to deceive both Plaintiff and the
10 public.
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14 A predicate for stating a cause of action under *Cal. Bus. & Prof. Code*
15 *section 17200*, the Plaintiff must, and in this case has, plead(ed) the facts that
16 support the underlying statutory violation. Assuming the Court will uphold
17 some or the entire other claims of Plaintiff; the section 17200 claim should be
18 upheld under the unlawful prong. See *Vogan v. Wells Fargo Bank, N.A.* 2011
19 WL 5826016 at *6-7 (upholding section 17200 claim because the court had
20 also upheld claim under the Truth in Lending Act, 15 U.S.C. section 1641(g)).
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24 **XVI. Plaintiff Has Sufficiently Alleged an Accounting Claim**

25 A "Fiduciary relationship between the parties is not required to state a
26 cause of action for accounting. All that is required is that some relationship
27 exists that requires an accounting." *Teselle v. McLoughlin*, 173 Cal. App. 4th
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1 156, 179 (2009). The elements for a claim for accounting are: (1) fiduciary
2 relationship or other circumstances appropriate to the remedy; and (2) a
3 balance due from the defendant to plaintiff that can only be ascertained by an
4 accounting. *See* Witkin, California Procedure, Pleadings, section 776, p 233
5 (4th ed.)
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8 Defendants have held themselves out to be Plaintiff's creditors when in
9 fact, as discussed above and more completely in the underlying complaint;
10 they have no right to collect any payments from Plaintiff. Because Defendants
11 have been enriched from this misrepresented relationship, a balance is due to
12 Plaintiff for payments received by Defendants. Plaintiff does not know and
13 could not know without an accounting, the balance due from Defendants
14 because of the structure of the misrepresented relationship. Generally, a
15 homeowner makes mortgage payments to the mortgage servicer. From there,
16 the servicer retains a portion of the payment as a servicing fee and distributes
17 the proceeds to the beneficiary. Because the beneficiary can change without
18 notice to the homeowner, the homeowner is left in the dark as to whom each
19 mortgage payment is distributed. An accounting is therefore needed.
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25 In addition, the purpose for requiring an accounting is to "discover what,
26 if any, sums are owed to the plaintiff[s]" and that "an accounting may be used
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1 as a discovery device” *Tessell v. McLoughlin* 173 Cal. App. 4th 156, 179
2 (2009).
3

4 **XVII. Plaintiff has Sufficiently Alleged a Violation of 18 U.S.C. section**
5 **1951(b)(2), and California has long recognized a claim of “Civil**
6 **Extortion”**

7 “California has long recognized a claim of civil extortion.” *Hisamatsu v.*
8 *Niroula*, 2009 WL 4456392 (N.D. Cal. Oct 22, 2009) at *5, See also *Flatley v.*
9 *Mauro* 139 P,3d 2, 46 Cal. Rptr 3d 605, 39 Cal. 4th 299 (2006) where the
10 written THREAT of initiating legal action and detrimental publicity was found
11 to be extortionate conduct. As discussed in *Levitt v. Yelp! Inc*, CV-10-02321-
12 EMC, 2011 U.S. Dist. LEXIS 124082 (N.D. Cal. Oct. 26, 2011), at *5:
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14 “However, to the extent courts have recognize such a claim, it is based on the
15 same elements as criminal extortion and therefore rises and falls along with
16 Plaintiff’s 17200 claim.”
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19 In the event the Court concludes there is no private right of action for
20 extortion as an independent cause of action, then the Court is respectfully
21 requested to grant leave to amend the complaint to merge the claims set forth
22 in this cause of action with Plaintiff’s claims under Cal. Business and
23 Professions Code section 17200.
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1 **XVIII. CONCLUSION**

2 Plaintiff's Complaint is well-pled and allows the Court to infer more
3 than the mere possibility that Linda Carroll is entitled to relief requested; in
4 fact, when the Court accepts the factual allegations as true the Court can make
5 a "reasonable inference" that the Defendants have engaged in misconduct for
6 which they may be liable. Although Defendants allege "factual" disputes in
7 their Motion, this is not sufficient to support this motion to dismiss. Therefore,
8 Plaintiff respectfully requests the Court DENY Defendant's Motion in its
9 entirety. To the extent, the Court dismisses any claim or allegations; Plaintiff
10 requests the opportunity to amend her pleadings to cure any deficiency, add
11 additional causes of action or rename any causes of action.
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17 Dated: August 22, 2012

17 By: /s/ Joseph La Costa

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19 _____
20 Joseph La Costa
21 Attorney for Plaintiff
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PROOF OF SERVICE

I, Joseph La Costa, declare that I am over the age of 18, and not a party to the within action. My business address is 7840 Mission Center Court, Suite 104, San Diego, CA 92108. I hereby certify that on August 25, 2013 I electronically filed with the Clerk of Court the following documents:

PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION TO DISMISS THE COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

using the CM/ECF system. The CM/EF system will provide such filing(s) via Notice of Electronic Filing (NEF) to the following NEF parties:

Ms. Wendy Miele, Esq.
Severson & Werson
19100 von Karman Ave, Ste 700
Irvine, CA 92612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 25, 2013 at San Diego, California.

/s/ Joseph La Costa

Joseph La Costa